

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANTHONY T. TRAPANI,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

) CASE NO. C13-5301-RSM-MAT
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) REPORT AND RECOMMENDATION
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) RE: SOCIAL SECURITY DISABILITY
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) APPEAL
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Plaintiff Anthony Tony Trapani proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be AFFIRMED.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1969.¹ He obtained a GED and has no past relevant work. (AR 33, 58.)

Plaintiff filed an application for SSI on June 1, 2010, alleging disability beginning January 1, 1995. His application was denied at the initial level and on reconsideration.

On November 29, 2011, ALJ Michael Gilbert held a hearing, taking testimony from plaintiff, a lay witness, and a vocational expert. (AR 42-100.) On March 22, 2012, the ALJ issued a decision finding plaintiff not disabled. (AR 19-34.)

Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on January 12, 2013 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ acknowledged the prior unfavorable decision finding plaintiff not disabled through February 9, 2009. (AR 136-44.) The ALJ found a change of circumstances based on plaintiff's new impairment of traumatic brain injury. (AR 22.) The ALJ found plaintiff had not engaged in substantial

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 gainful activity since the new application date of June 1, 2010.

02 At step two, it must be determined whether a claimant suffers from a severe impairment.
03 The ALJ found severe plaintiff's: anti-social personality disorder; polysubstance disorder;
04 depressive disorder and anxiety disorder; cognitive disorder, not otherwise specified/traumatic
05 brain injury; and headaches.

06 Step three asks whether a claimant's impairments meet or equal a listed impairment.
07 The ALJ found plaintiff's impairments during periods when he is not clean and sober to meet
08 the criteria of sections 12.08 (Personality Disorders) and 12.09 (Substance Addiction
09 Disorders) of the Listing of Impairments, 20 C.F.R. Pt. 404, Subpt. P, App. 1. The ALJ found
10 that if plaintiff stopped the substance use, he would continue to have severe impairments at step
11 two, but the impairments would not meet or equal any of the step three listed impairments.
12 Therefore, the ALJ found drug addiction or alcoholism (DAA) to be a contributing factor
13 material to disability, and continued with the sequential evaluation of disability.

14 If a claimant's impairments do not meet or equal a listing, the Commissioner must
15 assess residual functional capacity (RFC) and determine at step four whether the claimant
16 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
17 perform a full range of work at all exertional levels but with the following nonexertional
18 limitations: he could have no greater than occasional exposure to the operational control of
19 moving machinery or unprotected heights and hazardous machinery. He would be capable of
20 performing simple, routine, repetitive tasks, with no greater than reasoning level number two.
21 He could have no interaction with the public and no greater than occasional interaction with
22 co-workers as part of the job duties.

Because plaintiff had no past relevant work, the ALJ considered plaintiff's ability to perform other work with the assistance of a vocational expert. The ALJ found plaintiff able to perform a significant number of jobs in the national economy, including dish washer, hand packer, and ground keeper. Therefore, the ALJ found plaintiff not disabled.

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff assigns error to the ALJ's finding that DAA was a contributing factor material to his disability, and alleges he failed to properly evaluate the medical opinions of Dr. Ginsberg, Dr. Oyemaja, the state agency consultants, Ms. Sanders-Ross, ACBSW, Ms. McInnis, C.D.P., Dr. Ruddell, and Dr. Rasmussen. He asks that the ALJ's decision be reversed and his claim remanded for an award of benefits or, in the alternative, for additional proceedings. The Commissioner argues the ALJ's decision is supported by substantial evidence and should be affirmed.

DAA

A claimant is not entitled to disability benefits “if alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner’s determination that the individual is

disabled.” 42 U.S.C. § 423(d)(2)(C). Therefore, where relevant, an ALJ must conduct a drug abuse and alcoholism (DAA) analysis and determine whether a claimant’s disabling limitations remain absent the use of drugs or alcohol. 20 C.F.R. §§ 404.1535, 416.935. That is, the ALJ must, first, identify disability under the five-step procedure and, second, conduct a DAA analysis to determine whether substance abuse was material to disability. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). “If the remaining limitations would still be disabling, then the claimant’s drug addiction or alcoholism is not a contributing factor material to his disability. If the remaining limitations would not be disabling, then the claimant’s substance abuse is material and benefits must be denied.” *Parra v. Astrue*, 481 F.3d 742, 747-48 (9th Cir. 2007).

11 Although plaintiff argues the ALJ did not properly determine that DAA was material to
12 plaintiff's disability, he does not identify any specific error in the DAA methodology utilized
13 by the ALJ. Rather, plaintiff argues the ALJ improperly evaluated the evidence before and
14 after April 2011 (when plaintiff testified he became clean and sober). Plaintiff contends the
15 ALJ dismissed all of the evidence prior to April 2011, and most of the evidence after that date,
16 as tainted by past substance abuse, relying heavily on the adverse assessment of his credibility.
17 However, the gravamen of plaintiff's argument is that the ALJ failed to properly evaluate the
18 medical opinion evidence.

Medical Evidence

20 In general, more weight should be given to the opinion of a treating physician than to a
21 non-treating physician, and more weight to the opinion of an examining physician than to a
22 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not

01 contradicted by another physician, a treating or examining physician's opinion may be rejected
 02 only for "clear and convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,
 03 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may
 04 not be rejected without "specific and legitimate reasons" supported by substantial evidence in
 05 the record for so doing." *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.
 06 1983)). The ALJ may reject physicians' opinions "by setting out a detailed and thorough
 07 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
 08 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,
 09 881 F.2d at 751). Rather than merely stating her conclusions, the ALJ "must set forth [her]
 10 own interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing
 11 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

12 A. Arthur Ginsberg, M.D.

13 Plaintiff was referred by the Division of Disability Services to Dr. Ginsberg for a
 14 neurologic evaluation on September 22, 2010. (AR 327-30.) Dr. Ginsberg concluded that
 15 "[b]ased on my review of this patient's history and his neurologic evaluation, which includes
 16 severe headaches and severe cognitive impairment, as well as a prior history of incarceration
 17 for drugs, and a current status of being homeless, I would consider him to be gainfully
 18 unemployable at the present time." (AR 330.)

19 The ALJ gave "little weight" to Dr. Ginsberg's opinion, noting that Dr. Ginsberg found
 20 plaintiff to have a "severe cognitive impairment," yet reported no impaired cognitive findings
 21 during the neurological examination. This left Dr. Ginsberg to rely on plaintiff's subjective
 22 report, which the ALJ found not credible. (AR 31.) At any rate, the ALJ noted, the question

01 was not whether plaintiff was disabled – the ALJ agreed that plaintiff should be found disabled
 02 at step three. Rather, the question was whether plaintiff’s DAA was material, an issue that Dr.
 03 Ginsberg did not address.

04 Plaintiff asserts the ALJ rejected Dr. Ginsberg’s opinion because he was unaware of
 05 plaintiff’s substance abuse. Although, in fact, it does appear Dr. Ginsberg was unaware of
 06 plaintiff’s substance abuse (*see AR 328 (“He does not smoke or drink”))*, this was not one of the
 07 reasons the ALJ gave “little weight” to Dr. Ginsberg’s opinion. Plaintiff attempts to deflect
 08 the ALJ’s discounting of Dr. Ginsberg’s unsupported finding of cognitive impairment by
 09 arguing he did not actually conduct a cognitive evaluation, but relied solely on the records as a
 10 basis for this finding. Plaintiff’s point is not well taken, as Dr. Ginsberg stated specifically that
 11 his opinion was based both on the patient’s history “and his neurologic evaluation.” (AR 330.)
 12 Plaintiff does not dispute the absence of exam findings showing cognitive impairment, nor does
 13 the doctor specifically reference any of the medical records as support for his conclusions.

14 Plaintiff also attempts, without success, to dispute the ALJ’s characterization of Dr.
 15 Ginsberg’s opinions as based on plaintiff’s subjective reports. Dr. Ginsberg clearly stated that
 16 “this patient’s history” was one of the bases for his opinions. (*Id.*)

17 Finally, although not mentioned by the ALJ in the decision,² Dr. Ginsberg also based
 18 his opinion that plaintiff was “gainfully unemployable” on plaintiff’s criminal record and
 19 homelessness. (*Id.*) Neither of these conditions would satisfy the necessary showing of a
 20 “medically determinable physical or mental impairment” causing an inability to perform

21 2 See *Warre v. Comm’r of the SSA*, 439 F.3d 1001, 1005 n.3 (9th Cir. 2006) (finding it
 22 appropriate for the reviewing court to consider reasons offered not “to invent a new ground of
 decision[,]” but to provide “additional support for the Commissioner’s and the ALJ’s position.”)

01 substantial gainful activity. 20 C.F.R. § 404.1505(a).

02 The Court finds no error in the ALJ's consideration of Dr. Ginsberg's opinions.

03 B. Julie Oyemaja, Psy.D.

04 The Social Security Administration referred plaintiff to Dr. Oyemaja on October 5,
 05 2010 for a psychological evaluation. (AR 331-36.) Dr. Oyemaja concluded it was "highly
 06 unlikely" plaintiff would ever be able "to be competitively full time employed due to his
 07 cognitive, emotional, and behavioral concerns." (AR 334.) She commented that plaintiff was
 08 "a very ill individual in every respect, and his lack of social resources and homelessness
 09 exacerbates the matter." (*Id.*) The ALJ accepted this opinion for the time period that plaintiff
 10 was involved with substance abuse (which was ongoing at the time Dr. Oyemaja conducted the
 11 evaluation (AR 333)), but not for the period when plaintiff was sober and his behavior
 12 improved. (AR 31.) The ALJ also noted Dr. Oyemaja based her opinion, in part, on
 13 non-disability related factors, such as lack of social resources and homelessness.

14 Plaintiff's assignment of error consists of the assertion that "[t]he ALJ claimed to accept
 15 Dr. Oyemaja's opinion, but found that the objective evidence showed that without DAA, Mr.
 16 Trapani was able to perform the jobs he identified at step five of his decision on a regular and
 17 sustained basis. Dr. Oyemaja's report does not support such a conclusion. Neither does the
 18 other evidence in the record." (Dkt. 20 at 9 (citation to administrative record omitted).)
 19 Plaintiff fails to support this broad assertion with any legal argument. *Greenwood v. Fed.*
 20 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for an
 21 appellant, and a bare assertion does not preserve a claim, particularly when a host of other
 22 issues are presented for review.") Although the plaintiff's reply brief is more expansive, the

01 Court finds those arguments waived. *United States ex rel. Meyer v. Horizon Health Corp.*, 565
 02 F.3d 1195, 1199 n.1 (9th Cir. 2009) (new theory, first raised in a reply brief, is waived) (citing
 03 *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1020 (9th Cir. 1999) (arguments
 04 raised on appeal for the first time in a reply brief are waived)). At any rate, the Court finds the
 05 ALJ's consideration of Dr. Oyemaja's opinions to withstand scrutiny.

06 C. Leslie Postovoit, Ph.D. and Bruce Eather, Ph.D.

07 Dr. Postovoit completed a Psychiatric Review Technique questionnaire on November 4,
 08 2010 (AR 352-68, affirmed by Dr. Eather at AR 606.) As plaintiff notes, the ALJ failed to
 09 discuss this opinion.

10 Dr. Postovit did not conclude plaintiff was unemployable. To the contrary, the
 11 psychologist found plaintiff improved from a previous evaluation on November 12, 2009, and
 12 capable of performing work with essentially the same restrictions as those imposed by the ALJ.
 13 (Compare AR 26, with AR 369.) Furthermore, the psychologist's rating of plaintiff's
 14 functional limitations was actually less restrictive than that assessed by the ALJ. Dr. Postovoit
 15 assessed many limitations as "moderate" rather than "marked," and (in contrast to the ALJ) did
 16 not find plaintiff's impairments met or equaled any of the listed impairments. (Compare AR
 17 25, with AR 362-363.)

18 As a general principle, an ALJ's error may be deemed harmless where it is
 19 "'inconsequential to the ultimate nondisability determination.'" *Molina v. Astrue*, 674 F.3d
 20 1104, 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to "the record as a whole
 21 to determine whether the error alters the outcome of the case." *Id.* Plaintiff fails to meet his
 22 burden of showing that the ALJ's omission constituted harmful error. *Id.* at 1111 ("[T]he

01 burden of showing that an error is harmful normally falls upon the party attacking the agency's
 02 determination.'") (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

03 D. Dixie Sanders-Ross, A.C.B.S.W.

04 Dixie Sanders-Ross, A.C.B.S.W. (Academy of Certified Baccalaureate Social Workers)
 05 conducted a seventy-five minute intake assessment of plaintiff at Comprehensive Mental
 06 Health on December 23, 2010. (AR 639-57.) The ALJ gave "little weight" to Ms.
 07 Sanders-Ross's opinion that plaintiff was disabled because her assessment ignored plaintiff's
 08 substance abuse. (AR 32.) Plaintiff argues the ALJ's failure to give weight to Ms.
 09 Sanders-Ross amounts to an assumption that the social worker was incompetent: "The ALJ,
 10 who was not present at the evaluation, should not have substituted his opinion for that of a
 11 trained mental health provider." (Dkt. 20 at 12.)

12 Again, plaintiff's argument misses the mark. No special significance is given to the
 13 opinion of any medical source, not even to a treating physician, on issues reserved to the
 14 Commissioner, such as whether a claimant is disabled. 20 C.F.R. § 416.927(d)(3).
 15 Furthermore, the opinion of a social worker, such as Ms. Sanders-Ross, is given less weight
 16 than that of an "acceptable medical source" such as a licensed physician or certified
 17 psychologist. 20 C.F.R. § 416.913(d). The ALJ may discount the opinion of an "other
 18 source" such as Ms. Sanders-Ross based on germane reasons. *Smolen v. Chater*, 80 F.3d 1273,
 19 1288-89 (9th Cir. 1996) (rejection of the testimony of a lay witness must be based on a reason
 20 "germane to the individual," rather than a wholesale dismissal of all witnesses of that group.
 21 (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).

22 Here, the ALJ discounted Ms. Sanders-Ross's evaluation because she failed to account

01 for plaintiff's on-going substance abuse, instead accepting his representation that he "has
 02 become clean and sober." (AR 652.) Plaintiff, however, testified his clean and sober date
 03 was April 2011, several months after Ms. Sanders-Ross's evaluation. (AR 62.) The ALJ
 04 provided a germane reason for evaluating the opinion of Ms. Sanders-Ross.

05 E. Jane McInnis, C.D.P.

06 Similarly, plaintiff fails to demonstrate error in the ALJ's consideration of the opinion
 07 of Ms. McInnis. Ms. McInnis met with plaintiff on January 18, 2011 to develop a treatment
 08 plan. She described plaintiff's substance abuse history as "in sustained full remission." (AR
 09 611.) The ALJ found this contradicted by plaintiff's own testimony. (AR 32, 62.) The ALJ
 10 provided legally sufficient reasons for evaluating Ms. McInnis' opinions.

11 F. Alysa Ruddell, Ph.D.

12 Dr. Ruddell completed a psychological evaluation questionnaire on August 19, 2011.
 13 (AR 700-06.) She did not review any records, and stated that the information in the evaluation
 14 "represents client report, unless specified otherwise." (AR 700.)

15 The ALJ gave no weight to Dr. Ruddell's assessment, finding it inconsistent with the
 16 objective evidence, and based largely on plaintiff's self-report. (AR 32.) The ALJ found Dr.
 17 Ruddell's conclusions about plaintiff's functional capacities "completely inconsistent" with the
 18 evidence, including plaintiff's demonstrated abilities during the evaluation. The ALJ
 19 commented: "This evaluator appears to be taking on the role of an advocate, inflating her
 20 entire report." (*Id.*) Plaintiff objects to the ALJ's characterization of Dr. Ruddell as an
 21 advocate, arguing his mental status evaluation was abnormal. (AR 703.)

22 However, the ALJ also based his consideration of Dr. Ruddell's opinion on her reliance

01 on plaintiff's self-report, and the lack of review of any medical records. Dr. Ruddell clearly
 02 states that the information in the evaluation was based on plaintiff's report "unless specified
 03 otherwise." (AR 700.) Plaintiff has not challenged the ALJ's credibility assessment.
 04 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) ("An ALJ may reject a treating
 05 physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been
 06 properly discounted as incredible.") (quoting *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d
 07 595, 602 (9th Cir. 1999)).

08 The ALJ also found Dr. Ruddell's report internally inconsistent. Dr. Ruddell
 09 characterized plaintiff's reports of hearing his own thoughts as "auditory hallucinations," which
 10 the ALJ questioned as "generally considered thinking." (AR 32, 705.) See *Morgan*, 169 F.3d at
 11 603 (ALJ appropriately considers internal inconsistencies within and between physicians'
 12 reports). Dr. Ruddell chose "marked" as the degree of severity of impairment in plaintiff's
 13 "ability to perform routine tasks without undue supervision," concluding plaintiff "did not seem
 14 to be able to sustain attention sufficiently to maintain focus and perform routine/rote tasks," but
 15 the observation cited by the doctor to illustrate this impairment was plaintiff's ability to
 16 successfully follow instructions to fill out a form, fold it, and place it on the counter. (AR
 17 703.) Although plaintiff cites other findings in the mental status evaluation as abnormal, he
 18 does not specifically address those cited by the ALJ.

19 The Court does not find error in the ALJ's consideration of the opinions of Dr. Ruddell.

20 G. Christina Rasmussen, Ph.D.

21 Dr. Rasmussen performed a psychological evaluation on December 19, 2011 (AR
 22 707-19.) The ALJ compared this evaluation, conducted after plaintiff's clean and sober date,

01 with that conducted in October 2010 by Dr. Oyemaja. (AR 331-36.) In the earlier evaluation,
 02 plaintiff was still abusing alcohol and was irritable and explosive during his examination. (AR
 03 332.) In December 2011, when sober, he was cooperative and outgoing, answered the doctor's
 04 questions frankly with no defensiveness, and maintained a polite and helpful demeanor. (AR
 05 30, 712.) The ALJ concluded plaintiff's mental symptoms were not as pronounced during
 06 periods of sobriety.

07 The ALJ noted the primary functional limitations assessed were related to plaintiff's
 08 aggressive behaviors, but the examples cited were by history and affected by substance abuse at
 09 the time, as contrasted with plaintiff's improved functioning during sobriety. Accordingly, the
 10 ALJ accommodated any residual functional limitations with a RFC restriction on interaction
 11 with the public and no greater than occasional interaction with co-workers as part of the job
 12 duties. The ALJ also accommodated Dr. Rasmussen's evaluation findings of normal, though
 13 not perfect, cognitive flexibility, and mild limitations with simple instructions, with a RFC
 14 restriction to the performance of simple, routine, repetitive tasks, with no greater than reasoning
 15 level number two. (AR 30.) The ALJ distinguished his assessment of plaintiff's credibility
 16 with that of Dr. Rasmussen, who found plaintiff credible. Dr. Rasmussen noted that the
 17 assessed mental limitations were based on plaintiff's reports and the history he provided, as
 18 well as test results. (AR 709-10.) As previously noted, plaintiff does not challenge the ALJ's
 19 assessment of his credibility.

20 Plaintiff disputes the ALJ's failure to accept Dr. Rasmussen's finding that he suffered
 21 from borderline intellectual functioning, was unable to learn new tasks, and was markedly
 22 limited in his ability to interact with co-workers and supervisors. Plaintiff disputes the

01 adequacy of the ALJ's accommodation of these limitations with the RFC adopted by the ALJ.

02 However, the Court finds the ALJ's evaluation of Dr. Rasmussen's opinion supported
03 by substantial evidence and legally sufficient. "The ALJ is responsible for determining
04 credibility and resolving conflicts in medical testimony." *Magallanes*, 881 F.2d at 750; *see*
05 *also Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). The Court does not find
06 error in the ALJ's consideration of Dr. Rasmussen's evaluation.

07 CONCLUSION

08 For the reasons set forth above, the Court recommends this matter should be
09 AFFIRMED.

10 DATED this 22nd day of October, 2013.

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12 _____

13 Mary Alice Theiler
Chief United States Magistrate Judge